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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO GARCIA BELMONTE, JR., Defendant and Appellant.	F059759 (Super. Ct. No. F09903119) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Robert H. Oliver, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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On February 21, 2009, farm workers found Juan Garcia's decomposing body alongside three .22 caliber shell casings in a field near Kerman. A pathologist opined that multiple .22 caliber gunshot wounds to the head three days to two weeks earlier were

the cause of death. Months later, after the domestic violence arrest of her cohabitant Eduardo Garcia Belmonte, Sr., Neomi Vasquez told authorities she had seen Belmonte's sons, 16-year-old Eduardo Garcia Belmonte, Jr., and 21-year-old Juan Garcia Belmonte kidnap Garcia a couple of weeks before his body was found and had heard both sons talk about Garcia's fate afterward.[1]

A jury found Eduardo guilty of first degree special circumstance murder during commission of a kidnapping and guilty of kidnapping and found arming-of-a-principal-with-a-firearm allegations true in both counts.[2] In an exercise of statutory discretion, the court sentenced him to 25 years to life plus one year in prison. On appeal, he challenges the denials of his motion to suppress evidence and his motion to dismiss the case. He raises three special-circumstance instructional issues. He contests the sufficiency of the evidence of the special circumstance, the adequacy of an aiding and abetting instruction, and the assistance of counsel.[3] We affirm the judgment.

BACKGROUND

On August 12, 2009, an information charged Eduardo with the murder (count 1; Pen. Code, § 187, subd. (a))[4] and the kidnapping (count 2; § 207, subd. (a)) of Garcia. In count 1, the information alleged the special circumstances of an intentional killing by means of lying in wait (§ 190.2, subd. (a)(15)) and the commission of the murder while engaged in a kidnapping (§ 190.2, subd. (a)(17)(B)). In both counts, the information

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[1] For brevity and clarity, later references to the father are to "Belmonte" and to the sons as "Eduardo" and "Juan." The discussion sets out additional facts, issue by issue, as relevant. (*Post*, parts 1-4.)

[2] Though tried and convicted with Eduardo, Juan appeals separately. (*People v. Juan Garcia Belmonte* (F059761).)

[3] Apart from Eduardo's challenge to the denial of motion to suppress (*ante*, part 1), his other issues arise from his filing, and our granting, his application for joinder in Juan's issues. (Cal. Rules of Court, rule 8.200(a)(5).)

[4] Later statutory references are to the Penal Code unless otherwise noted.

alleged that a principal was armed with a firearm, to wit, a rifle, and that Eduardo was a 16-year-old minor. (§ 12022, subd. (a)(1); Welf. & Inst. Code, § 707, subd. (d)(1).)

On December 17, 2009, the court granted Eduardo's motion to set aside the lying-in-wait special circumstance allegation. (§§ 190.2, subd. (a)(15), 995.) On February 1, 2010, a jury found him guilty as charged, found true the murder-during-kidnapping special circumstance allegation, and found true the arming allegations in both counts, after which, on the prosecutor's motion, the court dismissed the arming allegation in the kidnapping count. On March 4, 2010, the court, in an exercise of statutory discretion, imposed a sentence of 25 years to life instead of a sentence of life without the possibility of parole on the murder count, imposed a consecutive sentence of one year on the arming enhancement to the murder count, and imposed and stayed the three-year middle term on the kidnapping count. (§§ 190.5, subd. (b), 208, subd. (a), 654, 12022, subd. (a)(1).)

DISCUSSION

1. Motion to Suppress

On the grounds that he did not knowingly, voluntarily, and intelligently waive his *Miranda*[5] rights and that his statements to detectives were involuntary as a matter of due process, Eduardo argues that the denial of his motion to suppress his statements was error. The Attorney General argues that there was no error and that error, if any, was harmless. We agree with the Attorney General that there was no error.

Eduardo filed a motion to suppress statements he made during a custodial interrogation by two detectives, the prosecutor filed an opposition, and the court held a hearing. One of the detectives testified. Both Eduardo and the detective were born in Mexico and fluent in Spanish. All of the conversations were entirely in Spanish. Both detectives identified themselves to Eduardo when they first spoke with him at the jail before walking him over to the interview room. After answering some questions about

[5] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

his family and about life in this country, Eduardo asked why he was being asked so many questions. Those questions were not designed to elicit incriminatory admissions, so no waiver of his *Miranda* rights was necessary yet. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1035, citing *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 602, fn. 14.)

Without answering Eduardo's question, but before asking him any questions about the crimes he was investigating, the detective told him he was a prisoner and telling the truth to "law enforcement here in this country" is important. The detective testified that neither he or Eduardo acted intimidatingly or threateningly toward the other before or after he read Eduardo his *Miranda* rights from the department-issued card in evidence:

"[Detective:] You have the right to remain silent.

"[Eduardo:] Uh, huh (affirmative).

"[Detective:] Anything you say may be used against you in court. You have the right to an attorney prior to and during any questioning.

"[Eduardo:] Uh, huh (affirmative).

"[Detective:] If you cannot afford an attorney, one will be appointed for you at no cost before any questioning.

"[Eduardo:] Okay.

"[Detective:] Do you understand, say yes or no?

"[Other detective:] Yes or no?

"[Eduardo:] Yes."

To "get some idea of the totality of the circumstances," to "observe both the demeanor [and] the manner in which the interview took place," and to observe the body language of the participants, the court, before ruling on the motion, reviewed a transcript of the English-language translation of the Spanish-language interrogation and the audio and video recording of the interrogation. Likewise, before ruling, the court not only took into consideration Eduardo's "age, experience, education, background, and intelligence" but also "read and reviewed" the report of a university professor who interviewed him,

documented his "highly dysfunctional" family and his "troubled upbringing," and noted "some of the traditions and customs in Mexico" such as the "acculturation of children" to be "submissive to authority figures, mainly law enforcement officials." By the totality of the circumstances standard, the court found the *Miranda* admonition "proper" and denied the motion. On appeal, Eduardo challenges the ruling "on the grounds of involuntariness, in violation of his federal and state constitutional privileges against self-incrimination and due process of law."

Miranda holds a defendant "may waive effectuation" of the rights against self-incrimination that the admonition conveys if "the waiver is made voluntarily, knowingly and intelligently." (*Miranda, supra,* 384 U.S. at p. 444.) "The inquiry has two distinct dimensions." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 (*Burbine*), citing *Edwards v. Arizona* (1981) 451 U.S. 477, 482 (*Edwards*); see also *Brewer v. Williams* (1977) 430 U.S. 387, 404.) "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal [*sic*] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Burbine*, *supra*, at p. 421, citing, e.g., *Fare v. Michael C.* (1971) 442 U.S. 707, 725.)

On appellate review of a *Miranda* ruling, the rule of law is settled that we accept the court's resolution of disputed facts and inferences as well as the court's evaluations of credibility, if supported by substantial evidence, and that we determine independently from facts not in dispute and from facts properly found true whether the challenged statements were illegally obtained. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) Even though Eduardo emphasizes that although the detective "read [him] his rights" he "never took any explicit waiver," the record shows both a choice without coercion and

the requisite level of comprehension. (Cf. *Burbine, supra,* 475 U.S. at p. 421.) "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.)

Even so, relying on *J.D.B. v. North Carolina* (2011) __ U.S. __, __ [180 L.Ed.2d 310, 328-329; 131 S.Ct. 2394, 2408], Eduardo argues that the detective's "exhortations regarding the importance of honesty and truth in speaking to the police and the negative implications for his life in the United States by a failure to speak" were inconsistent with *Miranda* and confusing to "any reasonable person, *let alone a juvenile*." (Italics added.) In *J.D.B.*, the juvenile was a 13-year-old seventh-grade middle school student. (*Id.* at p. __ [180 L.Ed.2d at p. 319; 131 S.Ct. at p. 2399].) Eduardo, on the other hand, was a 16-year-old high school dropout. After only one year in the United States, he already had two arrests on his record, one for possession of a firearm, the other for assault. The high court declined to hold "that a child's age is never relevant to whether a suspect has been taken into custody" and held that to ignore "very real differences" between children and adults "would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults." (*Id.* at p. __ [180 L.Ed.2d at p. 329; 131 S.Ct. 2394, 2408].) The court's ruling here did not deny Eduardo the full scope of those safeguards. By a totality of the circumstances, our analysis of the record persuades us that, contrary to his argument, he "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (*Miranda, supra,* 384 U.S. at p. 475; cf. *People v. Davis* (2009) 46 Cal.4th 539, 586 [reviewing court's duty is to "independently decide whether the challenged statements were obtained in violation of *Miranda*"].)

Since the waiver of one's rights and the voluntariness of one's statements are, of course, "discrete inquiries" (*Edwards, supra*, 451 U.S. at p. 484), we turn to Eduardo's voluntariness argument. "A confession or admission is involuntary, and thus subject to

exclusion at trial, only if it is the product of coercive police activity." (*People v. Williams* (1997) 16 Cal.4th 635, 659, citing, e.g., *Colorado v. Connelly* (1986) 479 U.S. 157, 167 (*Connelly*).) Although "mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." (*Connelly, supra,* at p. 165.) Quite to the contrary, "'coercive police activity is a prerequisite to a finding that a confession was involuntary.'" (*People v. McWhorter* (2009) 47 Cal.4th 318, 347, citing, e.g., *Connelly, supra,* at p. 167.) Our independent review of the record here satisfies us that, in the absence of coercive police activity, Eduardo's statements were voluntary. (*People v. Carrington* (2009) 47 Cal.4th 145, 169.)

2. Motion to Dismiss

Eduardo argues that the denial of his *Mejia*[6] motion to dismiss on the ground of Belmonte's deportation violated his federal constitutional rights to compulsory process and due process by depriving him of the favorable testimony of a material witness.[7] The Attorney General argues that there was no error. We agree with the Attorney General.

Attached to Eduardo's motion was a declaration in which defense counsel related a telephone conversation he had with Belmonte, who was in Mexico. Belmonte said that he saw Altamirano get into a fight and that he saw Garcia "placed in the car and taken away." He denied seeing anything else, hearing anyone say anything about a plan to do anything to anyone, telling Vasquez to go inside, and telling her "not to say anything about what happened that night or what she may have heard." Belmonte said he "cannot

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[6] *People v. Mejia* (1976) 57 Cal.App.3d 574.

[7] Eduardo joined in Juan's motion. For simplicity, we refer to the motion as Eduardo's. Eduardo's motion and the court's ruling addressed Geronimo Altamirano and Jesus Cuin, both of whom likewise were deported, but on appeal he challenges, and we address, solely the court's ruling as to Belmonte.

and will not" return to the United States "because he would have to come back without proper documentation."

The prosecutor filed an opposition arguing there was "no plausible showing" that Belmonte was a material witness, was not available due to governmental action, or would provide favorable evidence that would not be simply cumulative to Vasquez's testimony. The opposition noted that on the day of his deportation investigators were aware only of a "domestic violence situation," that Belmonte did not "witness the abduction" about which Vasquez was to testify, and that Belmonte refused to return to Fresno "for his own reasons."

At the hearing on the motion, Glenn Falls, the lead sheriff's office investigator, testified about his conversation with Vasquez on April 27, 2009, two days after Belmonte went to jail on the domestic violence complaint.[8] Vasquez told Falls that she witnessed Garcia's kidnapping, that Belmonte told her to go inside the house, that he knew what was going to happen, and that he was present during a later conversation about the crime, but that he did not participate. Falls testified that Belmonte remained in custody at the county jail until May 26, 2009, but no one ever interviewed him about the Garcia case.[9] Falls testified that on the next day, May 27, 2009, he found out Eduardo was in custody at the county jail on an immigration detainer, asked detectives to interview him, and monitored the interview.

As agreed by the defense, the court deferred a ruling on the motion until after Vasquez testified. From December 2008 to the time of the domestic violence incident, she testified, she, Belmonte, and Juan lived in one shack, and Eduardo lived in a nearby shack, in the part of Fresno known as Tent City. Sometimes Altamirano and Cuin stayed with them. Garcia lived nearby. On April 25, 2009, she and Belmonte got into an

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[8] After several court appearances, as the court later noted, the domestic violence charges against Belmonte were dismissed on May 20, 2009.

[9] The parties later stipulated that Belmonte was deported on May 26, 2009.

argument. He choked her and tried to kill her. He went to jail. She went to a domestic violence shelter. Afraid that he was going to kill her because she knew about Garcia's fate, she told a homicide detective what she knew.

Vasquez testified that some other people told her Garcia set Juan up to be robbed of drugs and money. Stabbed during the robbery, Juan was upset when he got out of the hospital.[10] He said that after he found out for sure what happened "they" – referring to himself, Eduardo, Altamirano, and Cuin – "were going to get back at [Garcia] for what had happened." He did not say how. Within a day or two or three after his release from the hospital, Vasquez saw Juan, Eduardo, Altamirano, and Cuin drag Garcia toward Juan's car, argue and fight with him, and try to put him into the trunk. Garcia was struggling, "yelling at them not to do anything to him," and insisting "he didn't have anything to do with what was going on." They did not get him into the trunk but did put him into the back seat. He sounded afraid. She told them to leave him alone. Belmonte pushed her into the shack and told her to get inside, stay inside, not to get involved, and not to say anything. She never saw Garcia again.

Later, Vasquez testified, as she, Juan, Eduardo, Belmonte, Cuin, and Altamirano sat around the fire drinking, she heard Juan talk "about they had beaten up [Garcia]" and "shot him in the head" with "the .22 that they had there" and that "he was glad that they got everything over with." He did not say who had shot him. She heard Eduardo say "he had hit him a couple of times" and "he was glad to get it done and over with." She heard Cuin say basically the same thing. She heard Altamirano talk about how he had hit him and how Garcia deserved what they had done to him. Belmonte, Juan, and Eduardo sat her down later and told her "if I ever said anything that I would end up the same way."

The test, the court observed, is whether the testimony of a deported witness is "material and favorable to the defense and not merely cumulative." The court noted that

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[10] The parties stipulated that the date of Juan's hospital emergency room treatment was February 4, 2009.

Belmonte's testimony "may have contradicted or impeached" Vasquez's testimony but did "not rise to the level of material and favorable, given the entire context of this case that would warrant the sanction of dismissal." The court commented that "as to threats or not threats to [Vasquez], [Belmonte]'s testimony would be certainly self serving to the effect that he did not, indeed, threaten her." On that rationale, the court denied the motion.

The parties agree that, without more, the "prompt deportation of illegal-alien witnesses" is "not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872-873.) The parties disagree on whether Belmonte's testimony would have been, to quote the court's rationale, "material and favorable to the defense and not merely cumulative." As the high court notes, "Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." (*Id.* at p. 873.) Even if we were to assume, arguendo, that Belmonte's testimony would have been material and favorable, "sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." (*Id.* at pp. 873-874.)

By that test, the record persuades us the court's ruling was correct. Belmonte had multiple biases to discredit any testimony he might have given. Both of his sons were on trial for murder. He was jailed for domestic violence against Vasquez. Had he testified inconsistently with her incriminating testimony, those biases would have diminished any credibility he might otherwise have had. The defense vigorously impeached Vasquez for the inconsistencies in her testimony and for the effects of her alcohol and drug abuse on

her ability to perceive the events to which she testified, but even so the jury found her to be a credible witness. On that record, there was no reasonable likelihood that Belmonte's testimony could have affected the judgment of the trier of fact.

3. CALCRIM No. 400

Eduardo argues that instructing the jury that an aider and abettor is *equally* guilty of the perpetrator's crime was error. The Attorney General argues that Eduardo forfeited his right to appellate review, that there was no error, and that error, if any, was harmless. We agree with the Attorney General that error, if any, was harmless.

First, the court instructed on general principles of aiding and abetting (CALCRIM No. 400 (Revised June 2007)): "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator who directly committed the crime. A person is *equally* guilty of the crime, whether he committed it personally or aided and abetted the perpetrator who committed it. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." (Italics added.)[11]

Second, the court instructed on the requisite proof of intent for aiding and abetting (CALCRIM No. 401):[12] "To prove the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] One, the perpetrator committed the crime. [¶] Two, the defendant knew that the perpetrator intended to commit the crime. [¶] Three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime. [¶] And, four, the defendant's words or conduct did, in fact, aid and abet the perpetrators in the commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrators unlawful purpose; he

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[11] The italicized word at the heart of Eduardo's argument no longer appears in the instruction. (See CALCRIM No. 400 (Revised April 2010).)

[12] The text of CALCRIM No. 401 is the same now as then.

specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the commission of that crime. [¶] If all of these requirements are proved, the defendant does not have to actually have been present when the crime was committed to be guilty as an aider and abettor." [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor; however, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor. [¶] The person who aids and abets a crime is not guilty of that crime if he withdraws before the crime is committed. To withdraw, a person must do two things: [¶] One, he must notify everyone else he – he knows is involved in the commission of the crime that he is no longer participating. The notification must be made early enough to prevent the commission of the crime. [¶] And, two, he must do everything reasonably within his power to prevent the crime from being committed. He does not actually have to prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you must not – you may not find the defendant guilty under an aiding and abetting theory.

The rule of law is settled that "'[a]ll persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, ... are principals in any crime so committed.' (§ 31.) Accordingly, an aider and abettor 'shares the guilt of the actual perpetrator.'" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) Since "aiders and abettors may be criminally liable for acts not their own, cases have described their liability as 'vicarious.' (E.g., *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) This description is accurate as far as it goes." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*).) But, as our Supreme Court emphasizes, "the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of

the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*Ibid.*, italics in original.)

Accordingly, "in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator." (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 (*Lopez*), citing *McCoy, supra*, 25 Cal.4th at pp. 1114-1122 [aider and abettor might be found guilty of first degree murder even if shooter is found guilty of manslaughter on an unreasonable self-defense theory]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [aider and abettor might be found guilty of lesser crime than the perpetrator where lesser crime that perpetrator committed was reasonably foreseeable consequence of act aided even though ultimate crime that the perpetrator committed was not]; see also *People v. Nero* (2010) 181 Cal.App.4th 504, 507 (*Nero*); *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 (*Samaniego*).)

In reliance on *Nero* and *Samaniego,* Eduardo argues that the inclusion of the word "equally" in CALCRIM No. 400 prejudiced him "because there was substantial evidence to support a theory that [he] was not the actual killer who had a different state of mind than the actual killer." He summarizes his theory at trial as, first, that he "was not guilty of felony murder" since Altamirano "was the actual killer who killed according to his own ulterior motive which was outside the common scheme of the kidnapping plan" and, second, that "the prosecution did not even charge [him] with personal use of the weapon" "precisely because the prosecution could not prove who fired the weapon." His argument fails to persuade us.

In his interview with the detectives, Eduardo admitted that he hit Garcia and helped take Garcia out to the field to kill him because of what Garcia had done to Juan. He even admitted that, had he had the chance to shoot Garcia, he would have shot him. Cuin had the gun, though, and then Cuin gave the gun to Altamirano, who shot Garcia three times.

After the killing, Eduardo took possession of the gun. The parties stipulated that he was in possession of a .22 caliber rifle and nine .22 caliber cartridges at the time of his arrest, that a criminalist who compared the bullets and the casings from test firings of that rifle with, respectively, bullets found in Garcia's body at the autopsy and the three .22 caliber shell casings found alongside his body in the field opined, first, that the bullets recovered from his body were probably fired from that rifle and, second, that the casings found alongside his body were fired from that rifle. Since the bullets recovered from his body were damaged on entering his body, the criminalist opined, an exact match of those bullets with the bullets from the test firings was not possible.

The independent or de novo standard of review is applicable in assessing not only whether instructions correctly state the law but also whether instructions direct a finding adverse to a defendant by removing an issue from the jury's consideration. (*People v. Posey* (2004) 32 Cal.4th 193, 218 (*Posey*).) "Here the question is whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525 (*Kelly*), citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 (*McGuire*).) Our duty is to review the instruction Eduardo challenges not "'in artificial isolation'" but "in the context of the instructions as a whole and the trial record." (*Ibid*.)

Jurors are presumed capable of understanding and correlating instructions and are presumed to have followed those instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*); *Lopez, supra,* 198 Cal.App.4th at p. 1119.) Harmless error is the applicable standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *Nero, supra,* 181 Cal.App.4th at pp. 518-519; *Samaniego, supra,* 172 Cal.App.4th at p. 1165.) Our independent review of the record persuades us that error, if any, in instructing the jury that an aider and abettor is *equally* guilty of the perpetrator's

crime was harmless beyond a reasonable doubt.[13] (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.)

4. Assistance of Counsel

Eduardo argues that his attorney's performance as to instruction with CALCRIM No. 400 constituted ineffective assistance of counsel.[14] The Attorney General argues that Eduardo fails to show ineffective assistance of counsel. We agree with the Attorney General.

To establish ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense, which requires a showing of a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 363, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 699 (*Strickland*).) "Surmounting *Strickland*'s high bar is never an easy task." (*Padilla v. Kentucky* (2010) 559 U.S. ___, ___ [176 L.Ed.2d 284, 301; 130 S.Ct. 1473, 1485].) "'Judicial scrutiny of counsel's performance must be highly deferential." (*Ibid.*, citing *Strickland, supra,* at p. 669.)

A reviewing court can adjudicate an ineffective assistance claim solely on the issue of prejudice without evaluating counsel's performance. (*Strickland, supra,* 466 U.S. at p. 697.) We do so here. Having rejected Eduardo's claim of error as to instruction with CALCRIM No. 400 (*ante,* part 3), we conclude that, since the absence of error precludes a showing of a reasonable probability that the result of the proceeding

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[13] In the interest of judicial economy, we addressed Eduardo's prejudice argument without addressing his error argument or the Attorney General's forfeiture argument.

[14] The court's discretionary imposition of a term of 25 years to life rather than a term of life without the possibility of parole (§ 190.5, subd. (b)) moots the four special circumstance arguments Eduardo raises by joinder in Juan's issues, both as independent issues on appeal and as premises of his assistance of counsel argument.

would have been different, the requisite showing of prejudice is lacking. (*Strickland, supra,* 466 U.S. at p. 694.)

DISPOSITION

The judgment is affirmed.

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Gomes, Acting P.J.

WE CONCUR:

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Poochigian, J.

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Detjen, J.